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Insurance (Life)--Warranty--Evidence (Nowak v. Brotherhood of American Yeoman, 249 N.Y. 78 (1928))

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Subdivision two is controlling when there are two or more sites; subdivision three, when there is but one. Both parties admit that the development of one plot would prevent development of the other, hence, though there are two parcels there is but one site, and subdivision three governs. The evidence supports the Commission's finding that defendant's interest constitutes the major part of the head and volume of the usable flow of water..

The State may delegate the power of eminent domain though it cannot permanently part with it. The only limitations on this rule are that the property must be for a public use, compensation must be paid therefor,[4] and due process of law must be observed. The production and distribution of electricity is a public use[5] and the State may appoint officers, bodies, or tribunals to determine the question of necessity.[6] The relator, moreover, was a party to the hearing before the Public Service Commission. As to equal protection, the State may withhold from all or delegate at will, its power of eminent domain.[7]

The question of the measure of damages to which the owners of the minor interests are entitled was not presented in this case. That point is being considered in a separate action.[8] A final determination of the statute's constitutionality is still to be had in an appeal, now pending, to the United States Supreme Court.

INSURANCE (LIFE)—WARRANTY—EVIDENCE.—Plaintiff seeks to recover the benefits payable under two life certificates issued by defendant association to one of its members, now deceased. The defense is a breach of warranty on the part of the assured, consisting of an alleged false statement in her application, that she had never consulted a doctor. The daughter of deceased called a physician on her own initiative when her mother complained of being troubled by a minor ailment. *Held,* that a negative answer to the question "Have you ever consulted a physician?" was not false as a matter of law. Nowak v. Brotherhood of American Yeomen, 249 N. Y. 78 (1928).

The doctor who attended deceased was called as a witness for the defendant and testified that she attended the assured at the request of the latter's daughter. When plaintiff's counsel asked the witness

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[4] Secombe v. R. R. Co., 90 U. S. 108 (1874).

[5] Walker v. Shasta Power Co., 160 Fed. 856 (C. C. A. 9th Cir. 1908); Matter of N. Lockport O. Power Co., 111 A. D. 686, 97 N. Y. S. 853 (1906); Matter of City of Rochester v. Holden, 224 N. Y. 386; 121 N. E. 102 (1918).

[6] *Supra,* note 5, 224 N. Y. 386, 390.

[7] Joslin Mfg. Co. v. City of Providence, 262 U. S. 668 (1923); People v. Adirondack Rwy. Co., 160 N. Y. 225; 54 N. E. 689 (1899); 176 U. S. 335, 20 Sup. Ct. 460 (1900).

[8] Niagara, Lockport & Ontario Power Company v. Horton, *et al.* (Order of Supreme Court, Oswego County, dated Aug. 4, 1928, confirming report of Commissioners of Appraisal. Defendants have appealed to Appellate Division, Fourth Department).

the nature of the disorder, defendant objected upon the ground that it was improper and his objection was sustained. Later, when the daughter was asked to give the conversation between the doctor and her mother, the defendant objected. Notwithstanding the fact that the bar of the statute,[1] prohibiting the revelation of confidential communications made to a physician, runs only against the physician himself, the court sustained the objection, stating at the same time, that if the doctor were re-examined, he would permit her (the doctor) to tell the conversation. However, no exception was taken to this ruling.

The doctor speaks English only and as deceased did not understand any but the Polish language, it is difficult to see how defendant can rely upon the bare statement of a physician that the assured consulted her, when it is plain that she could not understand a word that was said. The only communication between the deceased and the doctor was through the daughter, acting as interpreter. The substance of the conversation does not appear. Inasmuch as the physician was called by the daughter, not by deceased, the conventional relationship of doctor and patient did not exist between them. What was the information intended to be elicited by the question propounded by defendant? The assured was then sixty years of age. Surely the question did not require her to recall the occasion of every illness, great or small, for which a doctor prescribed some simple remedy. The question was immediately followed by an inquiry as to her health at the time. What more natural for the assured, who had just answered in the affirmative, to think that the former question required an affirmative answer only in case a previous consultation with a physician was in relation to a disorder which affected her present state of health.

In another case [2] the assured who had warranted the truth of his answers, had stated he never had a disease of the liver, although on several occasions he had been treated for congestion of the liver, the malady from which he died. It was held that his answer was not untruthful.

The answer of assured was not false as a matter of law and a direction of verdict was erroneous.[3] Moreover, it was error for the trial court to strike out the testimony of the daughter, as such evidence was not hearsay because it was not offered to prove the nature of the mother's complaint.[4] It tended to offset the inference, which otherwise might arise from the fact that there was a consultation between doctor and patient.

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[1] C. P. A., Sec. 352.

[2] Cushman v. U. S. Life Ins. Co., 70 N. Y. 72 (1877).

[3] Dilleber v. Home Life Ins. Co., 69 N. Y. 256 (1877); Higgins v. Phoenix Mut. Ins. Co., 74 N. Y. 6 (1878); Travelers Ins. Co. v. Pomerantz, 246 N. Y. 63; 158 N. E. 21 (1927); Valentini v. Metropolitan Life Ins. Co., 106 App. Div. 487; 94 N. Y. S. 758 (1st Dept. 1905); Eastern D. P. Dye Works v. Travelers Ins. Co., 234 N. Y. 441, 138 N. E. 401 (1923).

[4] Wigmore on Evidence, Second Ed., Vol. 2, Sec. 1361.